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# In the Supreme Court of the United States

OCTOBER TERM, 1995

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PUBLIC UTILITY COMMISSION OF OREGON,

Petitioner,

v.

GTE NORTHWEST INCORPORATED,

Respondent.

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On Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

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## REPLY BRIEF FOR PETITIONER

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## REPLY BRIEF FOR PETITIONER

Pursuant to Supreme Court Rule 15.6, petitioner submits this reply to the brief for respondent in opposition to the petition for certiorari. Three of respondent GTE's arguments go beyond matters argued in the petition.

1. The Oregon Supreme Court held that as a matter of state law, a state agency must have an express delegation of condemnation authority to enact a valid regulation that "takes" property in constitutional terms, even where that taking is compensated. The court further concluded that the PUC does not have that authority. Thus, the dispositive issue was whether the PUC's collocation rules in fact result in a taking of property. The state court held that they do and therefore invalidated the regulations.

GTE argues first that a federal question is not presented because the remedy the Oregon Supreme Court adopted (invalidation of the collocation rules) was dictated by state law. In GTE's view, that fact places the holding on the underlying constitutional violation (which, for purposes of this argument, GTE assumes to be federally based) beyond this Court's jurisdiction. Br. in Opp., 11.[1] That position makes neither legal nor logical sense. The federal issue (whether the

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[1] At one point in its argument, GTE suggests that to find a Fifth Amendment violation, a state court must reach the question of whether any compensation is adequate. Br. in Opp., 11. GTE cites no authority for that proposition. To the contrary, this Court repeatedly has affirmed the prerogative of both state and federal governments to abandon an offending regulation rather than to be forced to pay compensation and thus permanently to purchase a "taken" property interest. *See, e.g., First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304 (1987) (majority opinion); *id.*, 482 U.S., at 335 (dissenting opinion); *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 653, n. 19 (1981) (Brennan, J. dissenting).

rules effect a taking) unquestionably is central to the disposition of the case, even though the particular remedy (invalidation) is dictated by state law. It would be a remarkable encroachment on this Court's review of federal issues if a state court could place its conclusion that the federal constitution has been violated beyond this Court's reach simply by granting a federally adequate remedy as a matter of state law. Not surprisingly, this Court has never suggested such a limitation on its authority. In any event, the short answer to GTE's position is that, at a minimum, the Oregon Supreme Court's disposition of the case is clearly interrelated with or influenced by federal law principles. This Court therefore has jurisdiction to review the federal question. *See Three Affiliated Tribes v. Wold Engineering P.C.*, 467 U.S. 150, 152 (1984).

GTE attempts to cast a second jurisdictional cloud over this case. GTE points to the Oregon Supreme Court's "assumption" that the analysis under the state and federal constitutions is the same, arguing that the court "was resting its takings analysis on the Oregon Constitution" and thus on "adequate and independent state grounds." Br. in Opp., 12. What GTE fails to acknowledge is that, after assuming that the two constitutional guarantees are the same, the state court explicitly declined to decide the scope of the state guarantee.[2]

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[2] Specifically, the Oregon Supreme Court stated:

> *Loretto* was decided under the federal constitution. GTE offers no separate analysis under the state constitution. Accordingly, we assume, *without deciding*, that the analysis is the same under Article I, section 18, of the Oregon Constitution, and the Takings Clause of the Fifth Amendment of the Constitution of the United States.

Pet. Cert. App-11, n. 6 (emphasis added).

The state court then proceeded to examine the issue exclusively under this Court's Fifth Amendment takings jurisprudence and concluded by holding: "The challenged collocation rules effect a taking under *Loretto [v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)]." Pet. Cert. App-11 – App-22.[3]

That the judgment below turns on the state court's interpretation of federal constitutional principles could not be more explicit. Even if that conclusion were in doubt, however, the state court's resolution of the case, as we have already argued, is so interrelated with and influenced by federal law principles as to give this Court jurisdiction. *See Three Affiliated Tribes v. Wold Engineering P.C.*, 467 U.S., at 152. At a minimum, the Oregon Supreme Court's opinion must be understood as finding federal law persuasive and adopting Fifth Amendment principles into the court's interpretation of the state constitution.[4] In that circumstance, this Court has authority to pass on the federal question incorporated in the state law pronouncement, and if necessary, to remand the case to the state court for reconsideration. *Standard Oil Co. v. Johnson*, 316 U.S. 481, 485 (1942). GTE's efforts to cast

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[3] GTE also points to a sentence early in the opinion, in which the court outlined the order in which it would address the issues in the case, and identified as the first question "whether the PUC has authority to promulgate rules that effect a taking within the meaning of the Oregon Constitution." Pet. Cert. App-8. Given the state court's later analysis of the merits of the takings question, the court's reference to the state constitution, rather than the federal, in that introductory portion of its opinion appears purely inadvertent. In any event, that isolated statement cannot supersede the court's actual analysis and holding, which plainly are dependent on the court's interpretation of federal law.

[4] GTE all but concedes as much. Br. in Opp., 11 ("The Oregon Supreme Court did, of course, look to cases such as *Loretto*, *Florida Power*, and *Yee*, which interpret the U.S. Constitution * * * ").

the Oregon Supreme Court judgment as one that turns on an "adequate and independent state ground" is wholly without merit.

2. In the petition, the PUC has urged that the *per se* rule announced in *Loretto* cannot apply in the public utility context because GTE lacks significant aspects of the private property interests at issue in *Loretto* and its progeny. Pet. Cert. 12–19. In response, GTE argues that this Court cannot resolve that question because the factual record is inadequate. More specifically, GTE asserts that the particular record in this case contains no factual evidence to establish that, in return for its monopoly status, GTE agreed to surrender any of the "traditional incidents of private ownership" of its network. Br. in Opp., 20.[5] That answer misses the mark for two interrelated reasons.

First, GTE's utility property interests present a question of law, not of fact. Under the Just Compensation Clause, as under the Due Process Clause, property rights flow from state law. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). The PUC does not claim that it entered into some agreement, formal or informal, with GTE. Rather, the State of Oregon enacted laws to govern the provision of

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[5] Because of its procedural posture, this case has no factual record. GTE brought its challenge to the collocation rules under an Oregon law that permits a facial challenge to an administrative rule to be brought directly in the Oregon Court of Appeals without creation of a factual record either in the agency enacting the rule or in a trial court. Or. Rev. Stat. § 183.400; *AFSCME Local 2623 v. Dept. of Corrections*, 315 Or. 74, 79, 843 P.2d 409 (1992) ("judicial review under ORS 183.400 is limited to the face of the rule").

public utility services. GTE entered the utility business and is bound by those laws.[6]

Second, GTE's argument focuses on the wrong "incidents of ownership." GTE claims that it may incur debt upon its property and must pay taxes upon it. Br. in Opp., 20. Those assertions are only partly true (*see* n. 7, *infra*), and they are wholly irrelevant. The question here is whether the PUC's collocation rules fit within the *Loretto* analysis. The proper inquiry is whether, under pre-existing Oregon law, GTE could claim the incidents of property ownership identified as significant in that case—the exclusive right to "possess, use and dispose" of the property. 458 U.S., at 435. The dispositive answer is that GTE may only possess property with the State's approval, must use its property as state law directs, and may only dispose of its property on terms and conditions dictated by the State.[7] These commonplace limitations on utilities have caused this Court to acknowledge that the "partly public, partly private status" of utilities creates unique takings questions, *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989), a uniqueness GTE doggedly ignores. The question is not one that turns on factual proofs, but rather on the legal incidents of utility property ownership as established

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[6] Thus, although the PUC disputes GTE's contention that it no longer maintains a significant monopoly, that question is ultimately irrelevant.

[7] Or. Rev. Stat. §§ 759.100 through 759.115 (telecommunications utility must have PUC approval for expenditures for major contracts for purchase of equipment); Or. Rev. Stat. §§ 759.300 through 759.360 (PUC has power over issuance of securities, funds raised may be spent only under the terms of the order approving issuance); Or. Rev. Stat. § 759.580 (PUC may direct utility to extend service to unserved areas); Or. Rev. Stat. § 759.375 (telecommunications utility may not sell, lease, assign, mortgage, encumber, or otherwise dispose of utility property without PUC approval).

by state law. The Court's review of that question is in no way hampered by the lack of a factual record in this case.

3. As a final argument, GTE claims that the Telecommunications Act of 1996 renders the Oregon Supreme Court's decision "somewhere between totally insignificant and entirely moot." Br. in Opp., 25. GTE's point is less than clear, and GTE makes little effort to develop it.

GTE's mootness argument may be related to its effort, elsewhere in its brief, to shift the Court's attention away from the federal issue presented and to obscure it with the state law question of whether the Oregon legislature has delegated the PUC the authority necessary to effect a taking through regulation. GTE's claim may be: (1) the Oregon Supreme Court invalidated the collocation rules because it concluded that they effect a taking and that the PUC lacks authority to encroach on property interests in that way; (2) the Telecommunications Act of 1996 provides the PUC with the authority it previously lacked; (3) ergo, the collocation rule is no longer invalid and the case is moot.

The PUC's authority or lack of authority to order collocation is not, however, the question presented by the petition. If the PUC's only concern were with the invalidation of its rules, it could seek express eminent domain authority from the Oregon Legislature, as GTE points out. Br. in Opp., 9. The existence of the authority to order physical collocation, whether that authority springs from state or federal law, merely spares the rules from the particular disposition that the Oregon Supreme Court ordered. The essential conclusion—that the rules effect a taking—remains in place. That conclusion is profoundly important to government in its role as

utility regulator. GTE carefully reserves a claim that "the compensation scheme would not assure just compensation," Br. in Opp., 24, thus signalling that it is prepared to insist that as a condition of collocation, the States and the federal government are required to individually value and compensate every access requirement that involves a physical encroachment on utility property. That approach departs radically from this Court's unique public utility takings jurisprudence, which holds that regulatory action takes utility property only when the *overall* rate of return authorized by the rates it orders is unreasonable in terms of the utility's investment. *Duquesne Light*, *supra*. So long as the Oregon Supreme Court's underlying takings conclusion remains in place, the question remains vital.

Rather than moot this case, the Telecommunications Act of 1996 serves to elevate its importance. Interconnectivity in the telecommunications industry generally, and physical collocation requirements in particular, now stand as a national mandate adopted not only by the Federal Communications Commission and individual States, but by Congress itself. State collocation rules, like Oregon's, complement that policy and effectuate access and interconnectivity in those regulatory areas for which the States retain authority. The issue presented thus is more vital, not less so, in light of the new federal act. GTE nearly concedes as much, with its recognition that takings challenges will assuredly be raised in response to the federal collocation mandate, and that the issue promises to generate litigation in the federal courts. Br. in Opp., 25. GTE invites the Court to await that litigation. *Ibid*. The issue is squarely presented in this case, however. GTE's invitation to

delay will accomplish nothing more than to chill the regulatory environment in Oregon and perhaps elsewhere, while assuring that national policy for the technologically fast-paced field of telecommunications is tied up in litigation for the indefinite future. That result may be in GTE's self-interest, but it is does not serve any sound policy of prudence or judicial economy.

## CONCLUSION

The Court should grant the petition and issue a writ of certiorari to review the judgment and opinion of the Oregon Supreme Court.

Respectfully submitted,

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